

May 10, 2007

Ms. Mary McCoy
P.O. Box 263
908 West Street
Bethel, DE 19931

**RE: Freedom of Information Act Complaint
Against Town of Bethel**

Dear Ms. McCoy:

Our Office received your complaint on March 12, 2007 alleging that the Elections Committee of the Town of Bethel ("the Committee") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by meeting on February 19 and 22, 2007 with less than seven days' notice to the public as required by FOIA.¹

By letter dated March 12, 2007, our Office asked the Town to respond to your FOIA complaint in writing by March 23, 2007. Our Office received the Town's response by facsimile on March 23, 2007.

According to the Town, at a special meeting on February 14, 2007 the Town Council appointed an Elections Committee: Charlotte Givens, Janet Cordrey, and Ann Brumbly. An election was scheduled for February 24, 2007 for positions on the Town Council. The Town contends that the Committee could not have held its initial meeting prior to the election if it gave the public seven

¹ You also allege that the Committee held the February 19, 2007 meeting on a legal holiday. FOIA does not proscribe a public body from holding a public meeting on a legal holiday.

days' notice. "Therefore, on or about Friday, February 16, 2007, the notice and agenda was posted" three days before the Committee's first public meeting.

The Town provided us with a copy of the agenda for the Committee's February 19, 2007 meeting. The agenda listed for public discussion: "1. How elections will be run. 2. Who can and can't vote. 3. Public Comment." The agenda did not explain why the Committee could not have posted notice of its meeting at least seven days in advance.

According to the Town, "[a]fter the February 19, 2007 Election Committee meeting was held" the Committee became aware that it mistakenly informed the public that to vote a person had to be a resident of the Town for at least one year. "Therefore, Ms. Givens requested that a second Elections Committee meeting be held prior to the elections to provide this new information on voter eligibilities to all citizens of the Town of Bethel. A notice with agenda was posted on Wednesday, February 21, 2007"

The Town provided us with a copy of the agenda for the Committee's February 22, 2007 meeting listing as the only topic for discussion, "Revised Election Rules." According to the Town, two of the three Committee members "were not available to attend the meeting due to family and prior committee commitments" so "Ms. Givens proceeded with the meeting and provided the new information regarding voter eligibility,"

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA requires a public body to "give the public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least seven days in advance thereof. The notice shall include the agenda," *Id.* §10004(e)(1).

FOIA authorizes a public body to hold a special meeting with less than seven days' notice but the public body must post notice at least "24 hours before such meeting." *Id.* §10004(d)(3). "The public notice of a special . . . meeting shall include an explanation as to why [the normal seven days' notice] could not be given." *Id.*

FOIA defines a "meeting" as "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." *Id.* §10002(b).

LEGAL ANALYSIS

A. February 19, 2007 Meeting

According to the Town, the Committee posted public notice of its initial meeting on February 16, 2007 three days in advance of the meeting. The Town contends that the February 19, 2007 meeting of the Elections Committee was a special meeting for which FOIA required only 24-hours' notice to the public.

"Our Office has interpreted the shorter [24-hour] notice period allowed by FOIA for a special

Ms. Mary McCoy
May 10, 2007
Page 4

meeting to require some showing of an 'exigent circumstance or compelling need' for the public body to hold a special meeting to discuss a matter of public business.'" *Att'y Gen. Op.* 05-IB05 (Feb. 22, 2005) (quoting *Att'y Gen. Op.* 00-IB07 (Apr. 28, 2000)).

In *Att'y Gen. Op.* 05-IB05, our Office determined that there was no evidence in the record "to suggest that there were any exigent circumstances or compelling need for the Town Council to meet on three days' notice to discuss firing the Town Solicitor."

In *Att'y Gen. Op.* 04-IB02 (Jan. 28, 2004), our Office determined that the City "has shown exigent circumstances or compelling need to hold a special meeting. . . . After the Chancery Court's decision . . . the City was faced with exigent circumstances which could not wait to be addressed until the next regularly scheduled meeting of the City Council . . . The City took immediate steps to place a temporary moratorium on the issuance of new rental permits so as not to violate state law."

We believe that there was a compelling need for the Elections Committee to meet on February 19, 2007 with only three days' notice to the public. With the elections only a week away, it was important for the Town to inform the public about the electoral process and voter eligibility. If the Committee had given the public seven day's notice, its initial meeting would not have taken place until February 23, 2007, one day before the elections. We believe that the Committee had a compelling need to provide important information to the voters as many days in advance of the elections as possible.

The notice of the February 19, 2007 special meeting, however, did not "include an explanation as to why [the normal seven days' notice] could not be given." 29 *Del. C.* §10004(e)(3).

Our Office determines that the Elections Committee violated the public notice requirements of FOIA when it posted the notice and agenda for its February 19, 2007 special meeting three days in advance without including an explanation why the Committee could not give the public seven days' notice. *See Att'y Gen. Op.* 05-IB21 (Aug. 1, 2005) (notice of "'special meeting did not state an explanation why seven-days' notice could not be given'" (quoting *Att'y Gen. Op.* 04-IB01 (Jan. 28, 2004); *Att'y Gen. Op.* 94-IO37 (July 26, 1994) (notice of special meeting failed "to provide any explanation whatsoever concerning the reasons why the normal seven-day notice could not be given").

Our Office does not believe that any remediation is necessary for this FOIA violation. The purpose of the February 19, 2007 meeting of the Elections Committee was to provide information to the public about the upcoming electoral process and not to take any official action. The Town election went forward as scheduled on February 24, 2007 and remediation would not serve any purpose at this time. ²

B. February 22, 2007 Meeting

There are three members of the Elections Committee so a quorum is two members. The record shows that only one member of the Committee was able to make it to the meeting scheduled

² We would feel quite differently, however, if the Elections Committee had not corrected -- before the February 24, 2007 election -- the information given to the public at the special meeting on February 19, 2007 that only persons who had resided in the Town for at least one year were eligible to vote.

Ms. Mary McCoy
May 10, 2007
Page 6

for February 22, 2007 to correct the information previously provided to the public about a one-year residency requirement to vote. The open meeting requirements of FOIA did not apply to the gathering on February 22, 2007 because a quorum of the Committee (two members) was not present. *See Att'y Gen. Op. 07-ID04* (Mar. 13, 2007) ("the open meeting requirements of FOIA did not apply . . . because at the time a quorum . . . of the Board . . . was not present"). Therefore, it is legally irrelevant whether the Town gave the public seven days' notice of the February 22, 2007 intended meeting of the Committee.

Even if a quorum of the Elections Committee met on February 22, 2007, we believe that FOIA authorized the Committee to call a special meeting with only 24 hours' notice to the public for the same compelling reasons that the Committee gave less than seven days' notice for its February 19, 2007 meeting. With the election only two days away, it was imperative for the Committee to correct the information previously provided to the public about a one-year residency requirement to vote.

Ms. Mary McCoy
May 10, 2007
Page 7

CONCLUSION

For the foregoing reasons, our Office determines that FOIA authorized the Elections Committee to post the notice of a February 19, 2007 special meeting three days in advance – rather than the normal seven days required by FOIA – because the Town had a compelling reason to inform the public about the electoral process and voter eligibility prior to the February 24, 2007 elections.

Our Office determines that the Committee violated FOIA by not explaining in the notice for the February 19, 2007 meeting why the Committee could not give seven days' notice to the public. We do not believe that remediation is required for that violation now that the elections are over.

Our Office determines that the Town did not violate FOIA by posting the notice for the Election Committee's February 22, 2007 intended meeting one day in advance. Because a quorum of the Committee did not meet on February 22, 2007, the open meeting requirements of FOIA did not apply.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

Ms. Mary McCoy
May 10, 2007
Page 8

cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

John E. Tarburton, Esquire
Town Attorney

Mary Ann Haley
Opinion Coordinator